Dr David Vanniasingham Ramanathan v Subang Jaya Medical Centre Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–792 OF 2005

ABDUL AZIZ MOHAMAD, MOHD GHAZALI AND ZALEHA ZAHARI JJCA

8 DECEMBER 2006

Civil Procedure — Injunction — Interlocutory injunction, application for — Compelling hospital as employer to allow appellant to remain as medical consultant at the hospital until final disposal of appellant's case for reinstatement — Whether High Court should grant interlocutory injunction against employer so that workman could remain in the job until final determination of his representations

Labour Law — Employment — Injunction — Compelling hospital as employer to allow appellant to remain as medical consultant at the hospital until final disposal of appellant's case for reinstatement — Whether High Court should grant interlocutory injunction against employer so that workman could remain in the job until final determination of his representations

The appellant, a general surgeon, had been practising as a medical practitioner at the respondents' hospital since 1985 under successive agreements called 'Agreement Active Status', the last of which was dated 1 October 1995. On 1 June 2005, the respondents issued to the appellant a 'Notice of Non-Renewal' pursuant to cl 7(a), giving the appellant 60 days' notice of their intention not to renew the agreement. Considering himself a 'workman' as defined in the Industrial Relations Act 1967 ('the Act') and the respondents his employer and the notice as tantamount to a dismissal of himself by his employer without just cause or excuse, the appellant filed at the appropriate office of the Director General for Industrial Relations his representations in writing to be reinstated in his former office. On 18 July 2005, the appellant filed the originating summons in this case at the High Court together with an ex parte summons in chambers under the originating summons. In both the originating summons and the summons in chambers, the appellant sought various injunctions whose effect would be that the appellant would continue to function at the respondents' hospital as before, until the final disposal of the case. The appellant submitted that if the appellant was allowed to remain and work at the hospital, should he succeed in getting reinstatement, he would be there already, whereas if he was deprived of his job for many years before he succeeded in the Industrial Court, the court might not order reinstatement for reason of unfitness or unsuitability. At the High Court, the learned judge heard the summons in chambers inter partes, and he dismissed it. Consequently, he also dismissed the originating summons. This appeal followed.

Held, dismissing the appeal:

(1) In a case of representations for reinstatement under s 20(1) of the Act, the High Court should not grant, or should be incapable of granting, an interlocutory injunction so that the workman remains in the job until the determination of his representations. The Minister, in deciding under s 20(3) whether or not 'he thinks fit' to refer a workman's representations to the Industrial Court, will have to act according as to whether he finds that there are issues that need to be tried in the Industrial Court. In this case, for instance, the issues were whether the appellant was a 'workman' and, if he was, whether the respondents' refusal to renew the agreement was valid. The decision of the Minister is subject to judicial review by the High Court subsequently. For the High Court to now consider granting an interlocutory injunction, it will have to decide, first and foremost, whether there are serious issues to be tried in the Industrial Court as regards those matters. But that is a question that has to be decided also by the Minister as a statutory duty. If the High Court were to decide the question in dealing with the application for the interlocutory injunction, it would embarrass the Minister in his decision whether or not to refer the representations to the Industrial Court. The High Court would already have answered a question which may have to be answered on a judicial review of the decision of the Minister to refer or not to refer the representations to the Industrial Court. Therefore, the High Court ought not to have to find, except on a judicial review, whether there are serious questions to be tried in the Industrial Court, and since such a finding is an essential step in the granting of an interlocutory injunction, the bar to making such a finding should be a bar to granting an interlocutory injunction (see para 14).

(2) The learned judge was right in relying on *Penang Han Chiang* as an authority that bars the granting of the interlocutory injunction that the appellant sought. That authority is binding on this court, but apart from that, it is right that an interlocutory injunction should be incapable of being granted to enable a workman to remain in his job until his representations come to the end of the process (see para 15); *Penang Han Chiang Associated Chinese School Association v National Union of Teachers in Independent Schools, West Malaysia* [1988] 1 MLJ 302 followed.

[Bahasa Malaysia summary

Perayu, seorang pakar bedah am, telah beramal sebagai peramal perubatan di hospital responden sejak 1985 di bawah perjanjian-perjanjian berturut-turut dipanggil 'Agreement Active Status', yang terakhir bertarikh 1 Oktober 1995. Pada 1 Jun 2005, responden telah mengemukakan kepada perayu 'Notice of Non-Renewal' menurut kl 7(a), memberi perayu 60 hari notis untuk niat mereka untuk tidak memperbaharui perjanjian tersebut. Oleh kerana menganggap dirinya seorang 'workman' seperti yang ditakrifkan dalam Akta Perhubungan Perusahaan 1967 ('Akta tersebut') dan responden majukannya dan notis tersebut sama seperti suatu pemecatan terhadap dirinya oleh majikannya tanpa sebab atau alasan yang munasabah, perayu telah memfailkan di Pejabat Ketua Pengarah Perhubungan Perusahaan representasinya secara bertulis agar dikembalikan semula jawatannya. Pada 18 Ogos 2005, perayu

telah memfailkan saman pemula dalam kes ini di Mahkamah Tinggi bersama dengan saman dalam kamar secara ex parte di bawah saman pemula itu. Dalam kedua-dua saman pemula dan saman dalam kamar itu, perayu memohon beberapa injunksi yang mana agar perayu terus bertugas di hospital responden seperti sebelumnya, sehingga kes selesai. Perayu berhujah bahawa jika perayu dibenarkan kekal dan bekerja di hospital itu, sekiranya beliau berjaya mendapat balik jawatan asalnya, beliau akan berada di situ, walhal jika beliau tidak mendapat balik jawatannya untuk beberapa tahun lamanya sebelum beliau berjaya di Mahkamah Perusahaan, mahkamah mungkin tidak memerintahkan pengembalian jawatan asal oleh sebab ketidaksesuaian. Di Mahkamah Tinggi, hakim yang bijaksana telah mendengar saman dalam kamar secara inter partes dan beliau telah menolaknya. Berikutan itu, beliau juga telah menolak saman pemula. Rayuan ini pula dikemukakan.

Diputuskan, menolak rayuan tersebut:

(1) Dalam kes representasi untuk pengembalian kedudukan jawatan di bawah s 20 Akta tersebut, Mahkamah Tinggi tidak patut membenarkan, atau tidak berkemampuan untuk membenarkan, satu injunksi interlokutori agar pekerja tersebut kekal dalam jawatan itu sehingga terdapat keputusan berhubung representasinya. Menteri, dalam membuat keputusan di bawah s 20(3) sama ada atau tidak 'he thinks fit' untuk merujuk representasi pekerja ke Mahkamah Perusahaan, perlu bertindak sewajarnya berhubung sama ada beliau mendapati bahawa terdapat isu yang perlu dibicarakan di Mahkamah Perusahaan. Dalam kes ini, contohnya, iau-iaunya adalah sama ada perayu adalah seorang 'workman' dan, jika sedemikian, sama ada keengganan responden untuk memperbaharui perjanjian tersebut adalah sah. Keputusan Menteri tertakluk kepada semakan kehakiman oleh Mahkamah Tinggi. Untuk Mahkamah Tinggi membenarkan satu injunksi interlokutori, perlu diputuskan, terlebih dahulu sama ada terdapat isu-isu penting yang perlu dibicarakan di Mahkamah Perusahaan berkaitan perkara tersebut. Namun ia juga satu persoalan yang perlu diputuskan juga oleh Menteri sebagai tugas statutori. Jika Mahkamah Tinggi memutuskan persoalan dalam mengendalikan permohonan untuk injunksi interlokutori itu, ia akan memalukan Menteri dalam keputusannya sama ada atau tidak perlu merujuk representasi kepada Mahkamah Perusahaan. Mahkamah Tinggi sepatutnya telah menjawab persoalan yang mungkin telah dijawab atas semakan kehakiman terhadap keputusan Menteri itu untuk merujuk atau tidak merujuk representasi tersebut ke Mahkamah Perusahaan. Oleh itu Mahkamah Tinggi tidak sepatutnya mendapati, kecuali atas semakan kehakiman, sama ada terdapat persoalan penting yang perlu dibicarakan di Mahkamah Perusahaan, dan memandangkan penemuan sedemikian adalah langkah penting untuk membenarkan injunksi interlokutori, sekatan untuk membuat penemuan sedemikian hendaklah menjadi sekatan dalam membenarkan suatu injunksi interlokutori (lihat perenggan 14).

(2) Hakim yang bijaksana adalah betul untuk bergantung kepada *Penang Han Chiang* sebagai autoriti yang menyekat kebenaran injunksi interlokutori yang mana perayu pohon. Autoriti tersebut mengikut mahkamah ini, tetapi selain daripada itu, adalah betul bahawa injunksi interlokutori tidak patut dibenarkan bagi membolehkan seorang pekerja kekal dalam jawatannya

sehingga representasinya selesai prosesnya (lihat perenggan 15); *Penang Han Chiang Associated Chinese School Association v National Union of Teachers in Independent Schools, West Malaysia* [1988] 1 MLJ 302 diikut.]

Notes

For a case on injunction, employment, see 8(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 1040.

For cases on application for interlocutory injunction, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 2563–2570.

Cases referred to

Ashton v Shoreline Hotel [1994] 1 ERNZ 421 (refd)

Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat & Ors [1981] 1 MLJ 238 (refd)

Hill v CA Parsons & Co Ltd [1972] 1 Ch 305 (refd)

Kuantan Beach Hotel Sdn Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Restoran Semenanjung Malaysia [2004] 6 MLJ 608 (refd)

Penang Han Chiang Associated Chinese School Association v National Union of Teachers in Independent Schools, West Malaysia [1988] 1 MLJ 302 (folld)

R Rama Chandran v The Industrial Court of Malaysia [1997] 1 MLJ 145 (refd)

RCA Sdn Bhd v Pekerja-Pekerja RCA Sdn Bhd [1991] 1 MLJ 309 (refd)

Legislation referred to

Industrial Relations Act 1967 ss 4, 5, 7, 8, 20(1), (3)

Appeal from: Originating Summons No R1–24–56 of 2005 (High Court, Kuala Lumpur)

Su Tiang Joo (Teh Eng Lay with him) (Cheah Teh & Su) for the appellant.

Dato' M Pathmanathan (Rutheran Sivagnanam with him) (R Sivagnanam & Associates) for the respondents.

Abdull Aziz Mohamad JCA (now FCJ, delivering judgment of the court):

[1] The appellant, a general surgeon, had been practising as a medical practitioner at the respondents' hospital since 1985 under successive agreements called 'Agreement Active Status', the last of which was dated 1 October 1995. He was not drawing a salary for working at the hospital but instead he received professional fees from the patients he treated, less agreed deductions in favour of the respondents for expenses incurred by the respondents. The appellant had to pay the respondents rental for the use of the hospital's clinic facilities. The appellant never entered into a contract of employment with the respondents. The Agreement Active Status, in which the appellant and the respondents were referred to respectively as 'the Consultant' and 'SJMC', was not a contract of employment. It was an agreement setting out terms and conditions of the appointment of the appellant by the respondents 'to practise as a medical professional in the Hospital' (clause 1). Clause 13 ranked the appellant as an independent contractor in these words: 'For the

purposes of this Agreement and all the obligations undertaken and the services to be provided hereunder, the Consultant shall be an independent contractor and not the agent or servant of SJMC'. Clause 7 provided as follows:

PERIOD Of AGREEMENT

a This Agreement shall come into force on the 1st day of October 1995 for a period up to 1st August 1996 and shall be automatically renewed for a period of three (3) years unless either party gives at least sixty (60) days prior written notice to the other party of its intention not to renew the agreement. At the end of the first three year renewal the contract will be automatically further renewed for subsequent three year periods until the consultant reaches 60 years of age unless either party gives written notice of at least sixty (60) days prior to the term ending to the other party of its intention not to renew the agreement. After the Consultant attains the age of sixty (60), his appointment shall automatically be renewed for successive periods of one (1) year each, provided that either party may terminate this Agreement by giving written notice to the other of its intention not to renew the consultant's appointment not later than sixty (60) days before the expiry of a one-year renewal period.

b In the event SJMC elects not to renew any term of this Agreement, SJMC agrees to hold prior consultation with and receive input from the MAB.

c Notwithstanding anything to the contrary, this Agreement may at any time be terminated by mutual consent of the parties hereto.

[2] On 1 June 2005, the respondents issued to the appellant a 'Notice of Non-Renewal' pursuant to cl 7(a), giving the appellant 60 days' notice of their intention not to renew the agreement. The 60 days would lapse on 31 July 2005.

[3] Considering himself a 'workman' as defined in the Industrial Relations Act 1967 ('the Act') and the respondents his employer and the notice as tantamount to a dismissal of himself by his employer without just cause or excuse, on 1 July 2005 the appellant filed at the appropriate office of the Director General for Industrial Relations his representations in writing to be reinstated in his former, or what would soon be his former, office. The making of the representations was done pursuant to s 20(1) of the Act. The Director General was to take necessary steps towards an expeditious settlement of the representations. If there was no likelihood of the representations being settled he was to report to the Minister, who, under s 20(3), may, if he thinks fit, refer the representations to the Industrial Court for an award.

[4] On 18 July 2005, the appellant filed the originating summons in this case at the High Court together with an ex parte summons in chambers under the originating summons. Except that the originating summons had additionally a prayer for a declaration of entitlement to apply, both the originating summons and the summons in chambers sought various injunctions whose effect would be that the appellant would continue to function at the respondents' hospital as before, until, in the case of the summons in chambers, the originating summons are disposed of, and in the case of the originating summons, until, if the representations are not referred by the Minister to the Industrial Court, it is finally determined after judicial review and appeals that the decision not to refer was correct, or until, if the representations are referred to the Industrial Court, the Industrial Court decides on them.

[5] As to the appellant's reason for needing the injunction, in his oral submission before us the appellant's counsel submitted that if the appellant was allowed to remain and work at the hospital, should he succeed in getting reinstatement, he would be there already, whereas if he was deprived of his job for many years before he succeeded in the Industrial Court, the court might not order reinstatement for reason of unfitness or unsuitability as happened in *R Rama Chandran v The Industrial Court of Malaysia* [1997] 1 MLJ 145 at p 185D–E. In this connection, counsel cited Goddard CJ's lament in *Ashton v Shoreline Hotel* [1994] 1 ERNZ 421 at p 436 about the remedy of reinstatement in the Employment Tribunal having become 'something of an endangered species' and his call for the ordering of reinstatement where there is no good reason for refusing to order it. It is fair to point out that the fear of not being given reinstatement was not quite the reason given by the appellant in his affidavit. In para 23 of his affidavit dated 18 July 2005, the appellant said that if interim injunction was refused him the remedy of reinstatement might be rendered nugatory. After setting out the several stages of the process that representations under s 20(1) have to go through before they are decided by the Industrial Court, the appellant said:

> (b) This process may easily take up to three years, if not longer. Thus, the statutory remedy of reinstatement may be meaningless when and if it is awarded given that the fairly large body of patients under my care would have been reassigned or referred to other doctors and my position as a Consultant General Surgeon in the defendant hospital extinguished.

What the appellant feared was not that reinstatement would be refused him but that 'when and if it is awarded' the order of reinstatement might be meaningless for the stated reasons.

[6] At the High Court, the learned judge heard the summons in chambers inter partes, and he dismissed it. Consequently, he also dismissed the originating summons. This appeal followed.

[7] The learned judge agreed with the respondents' contention that such an injunction as the plaintiff sought 'cannot be given during the pendency of a representation for reinstatement under the Act'. He went on to say in para 15 of the grounds of judgment: 'In fact there has been a succession of cases which have declined or revoked interim injunction during the pendency of a referral to the Industrial Court or even after a referral to the Industrial Court.' Three cases were cited. We agree with the appellant's counsel that two of them are not reinstatement cases and therefore are of little assistance to the question in hand. They are *RCA Sdn Bhd v Pekerja-Pekerja RCA Sdn Bhd* [1991] 1 MLJ 309 and *Kuantan Beach Hotel Sdn Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Restoran Semenanjung Malaysia* [2004] 6 MLJ 608.

[8] The other case, which appears to be a reinstatement case, is *Penang Han Chiang Associated Chinese School Association v National Union of Teachers in Independent Schools, West Malaysia* [1988] 1 MLJ 302, a decision of the Supreme Court, then the apex court. It was about certain teachers employed by the appellants on a fixed term, yearly, basis under service agreements which provided for renewal of the contract. Disputes arose between the appellants and the teachers but the cause or nature of the disputes is not spelt out in the judgment. A complaint was made to the Ministry

concerned and the Minister referred the complaint to the Industrial Court under s 8 of the Act. After that the respondents, who acted for the teachers, filed a civil suit in the High Court, whose aim is not disclosed in the judgment, and obtained an interlocutory injunction the terms or purport of which are also not disclosed. The Supreme Court, on appeal, finding that the granting of the interlocutory injunction by the High Court was not an exercise of judicial discretion, said that 'the appellate court is at liberty to rehear the whole application on its merits' and proceeded to state the following conclusion:

> Now, this is an action where the respondents, purporting to represent former teachers employed by the appellant, alleges breaches of service contracts, which trade dispute had been referred by the Minister of Labour to the Industrial Court for a hearing. In our judgment, when a trade dispute had been invested in the Industrial Court, particularly one involving allegation of wrongful dismissal, the High Court should be slow to interfere by way of interlocutory injunction except for very special circumstances and none appeared to have been shown by the respondents in the court below. Nor was any attempt to establish it during the hearing of the appeal. The reason, in our opinion, is obvious. The Industrial Court is the proper forum to deal with such complaint since it is empowered by the Industrial Relations Act 1967 (as amended) to order the employer to reinstate the workman in his former position or a similar position if the Industrial Court should hold that the dismissal was without just cause or excuse. No such power is vested in the High Court. The jurisdiction of the High Court is limited to an award of damages for breach of contract for wrongful dismissal or termination only and damages are usually inadequate compensation for loss of employment (see *Vine v National Dock Labour Board* [1957] AC 488).

We take that to be a conclusion reached after rehearing the whole application on its merits. The interlocutory injunction was set aside.

[9] From the phrases 'allegation of wrongful dismissal' and 'to reinstate the workman' in the passage it may be assumed that in that case the teachers had complained of wrongful dismissal and had sought reinstatement, although it is not revealed how all that was connected to a reference under s 8, which concerns complaints of contravention of ss 4, 5 and 7 about rights in respect of trade unionism. But the message is clear. Where a trade dispute, 'particularly one involving allegation of wrongful dismissal', is with the Industrial Court, the High Court should not, by way of interlocutory injunction, 'interfere', which we take to include giving relief to either party. Excepted are 'very special circumstances'.

[10] As to why the Supreme Court considered that the granting of the interlocutory injunction was not an exercise of judicial discretion, the reason is given at p 303G–I (left) in the following words:

> The learned judge did not appear to consider the balance of convenience. If he had done so, he seemed to have disregarded the well-established rule that a contract for service or service contract would not be specifically enforced by the High Court (see s 20((1)(b) of the Specific Relief Act 1950) and that an injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced (see s 54(f) of the same Act and *Hill v CA Parson & Co Ltd* [1977] 3 All ER 1345).

Although disregard of the unavailability of injunction to specifically enforce a service contract was the reason for the finding that the granting of the interlocutory

injunction in that case was not an exercise of judicial discretion, the decision of the Supreme Court to set aside the interlocutory injunction after rehearing the whole application on its merits was not founded on that reason. From the passage earlier quoted in which the Supreme Court stated their conclusion, the reason appears to be of a jurisdictional nature. The thinking seems to be that since the power to decide a trade dispute, including the reinstatement of a workman, is vested in the Industrial Court and not in the High Court, the High Court has no jurisdiction to play any role in respect of the dispute, including the granting of interlocutory injunctions for the relief of a party to the dispute.

[11] Learned counsel for the appellant in his oral submission advanced this argument in order to persuade us not to treat the decision as good authority. He said that it was not brought to the attention of the Supreme Court that s 20(1) of the Act provides, by the remedy of reinstatement, an exception to the rule that a contract of service cannot be specifically enforced and that in *Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat & Ors* [1981] 1 MLJ 238, the Federal Court, the then apex court, at p 239H (right), described the remedy of reinstatement as 'a statutorily recognized form of specific performance'. The argument might be relevant only if the reason for the setting aside of the interlocutory injunction was because a contract of service cannot be specifically enforced, but as has been observed, that was not the reason. The reason was of a jurisdictional nature.

[12] The appellant's counsel also sought to distinguish the *Penang Han Chiang* case from the present case by the fact that in that case the dispute had gone to the Industrial Court whereas in this case the dispute was still with the Director General. We do not think that makes any difference to the application of the decision in the *Penang Han Chiang* case. The dispute in this case is going to end up in the Industrial Court if the Director General fails to settle it and the Minister decides to refer it to the Industrial Court.

[13] The appellant's counsel further submitted that according to *Penang Han Chiang*, an interlocutory injunction may be issued in 'very special circumstances'. Apart from the fact that the decision gives no indication of the kind of circumstances that may be considered very special and the fact that we are moreover reluctant to hold that the circumstances in this case are very special, it seems to us that the Supreme Court themselves did not envisage the existence of very special excepting circumstances as likely. They said that no attempt had been made to show the existence of very special circumstances in the appeal and the reason for the absence of such an attempt was, to them, the obvious one of jurisdiction. It was as though to the Supreme Court, for the reason of jurisdiction, and not for any want of merit, any attempt to show the existence of very special circumstances would have been in vain, and the respondents knew it.

[14] It makes good sense that in a case of representations for reinstatement under s 20(1) of the Act, the High Court should not grant, or should be incapable of granting, an interlocutory injunction so that the workman remains in the job until the determination of his representations. The Minister, in deciding under s 20(3) whether or not 'he thinks fit' to refer a workman's representations to the Industrial

Court, will have to act according as to whether he finds that there are issues that need to be tried in the Industrial Court. In this case, for instance, the issues are whether the appellant is a 'workman' and, if he is, whether the respondents' refusal to renew the agreement was valid. The decision of the Minister is subject to judicial review by the High Court subsequently. For the High Court to now consider granting an interlocutory injunction, it will have to decide, first and foremost, whether there are serious issues to be tried in the Industrial Court as regards those matters. But that is a question that has to be decided also by the Minister as a statutory duty. If the High Court were to decide the question in dealing with the application for the interlocutory injunction, it would embarrass the Minister in his decision whether or not to refer the representations to the Industrial Court. The High Court would already have answered a question which may have to be answered on a judicial review of the decision of the Minister to refer or not to refer the representations to the Industrial Court. Therefore, the High Court ought not to have to find, except on a judicial review, whether there are serious questions to be tried in the Industrial Court, and since such a finding is an essential step in the granting of an interlocutory injunction, the bar to making such a finding should be a bar to granting an interlocutory injunction.

[15] The learned judge was right in relying on *Penang Han Chiang* as an authority that bars the granting of the interlocutory injunction that the appellant sought. That authority is binding on us, but apart from that, as has been explained, it is right that an interlocutory injunction should be incapable of being granted to enable a workman to remain in his job until his representations come to the end of the process. It is therefore not necessary to consider the string of cases from other jurisdictions cited by the appellant's counsel, headed by *Hill v CA Parsons & Co Ltd* [1972] 1 Ch 305, to persuade us that interlocutory injunctions have been granted as an exception to the rule that contracts of service are not specifically enforceable, beyond saying that those are not cases that involved the impediment of another jurisdiction, the industrial relations jurisdiction, as the present case does.

[16] We dismiss this appeal with costs and order that the deposit be paid to the respondents to account of taxed costs.

Appeal dismissed.

Reported by Loo Lai Mee